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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

THE AMERICAN SHEET & TIN PLATE COMPANY, ET AL., *Appellees.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Brief on Behalf of Certain Railroad Companies, as *amici curiae*

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April 1, 1937.
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WEIRTON STEEL COMPANY, *Appellee*

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vs.

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PRELIMINARY STATEMENT

With the consent of the parties, this brief is respectfully filed on behalf of a large group of railroad companies as listed in Appendix A. Operating generally in the eastern industrial states, these railroads are greatly interested in the questions presented in the cases at bar and urge the affirmance of the decree of the lower court.

In the proceedings before the Commission which gave rise to the instant litigation, these railroads took the position, to which they still adhere, that the service of placing cars at convenient points of loading and unloading within industrial plants similar to those of appellees'—a service hereinafter referred to as "spotting"—is an integral part of their transportation obligation under the regular line haul freight rates. Accordingly, they do not subscribe to the general findings of the Commission which underlie the orders herein involved but, on the contrary, believe that they are grounded upon incorrect conclusions of fact and represent the repeated misapplication of sound principles of law.

SUMMARY OF ARGUMENT

(1) The spotting service performed for industry in general and for the plants involved in these cases in particular is not in excess of team or simple switch placement. And even if it be assumed to be, *arguendo*, there is nothing in the law to condemn such service.

(2) There is no such interruption or interference arising from the "desires" of the owners of the plants, i. e. the appellees, as to warrant the Commission in condemning the spotting services there performed. Under the law no allowance for a spotting service should be paid where an industry withholds permission to enter the plant, and of this principle of law the railroads, in employing agents, are aware. But in the cases at bar it is clear that the Com-

mission has gone beyond a fair application of this principle and arrived at unreasonable and arbitrary results.

(3) The Commission's findings of interruption or interference arising from the "disabilities" of a plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, are, as exemplified by the cases at bar, unwarranted. The railroads agree that where the disabilities of a plant give rise to interruption or interference which cannot be removed and render their performance of a spotting service impossible, delivery is accomplished by the placement of cars upon interchange tracks (located at or near the plant gates). However, the railroads contend that, in the instant cases, the Commission has, in many particulars, misconstrued this legal concept. That the convenience of a plant is served in the spotting of cars, as a matter of operating routine, does not render such service unlawful, and an obligation under line haul rates to perform such service, once properly established, cannot be repudiated solely because, for the purpose of serving their own ends, the railroads have increased the size, or changed the type of the locomotives which are available in the vicinity. Moreover, the legality of a spotting service does not depend upon whether it can be accomplished, as found by the Commission, "in one uninterrupted movement" at the railroad's operating convenience.

(4) The spotting service performed for industry in general, and for these plants in particular, is customary and included in the line haul rates. This is apparent from many findings of the Commission, some of which deal with the very same spotting services as here in issue. It is also apparent from the recognized scope of the line haul rates which the Commission has, from time to time, prescribed on various commodities.

(5) Finally, the performance of a spotting service by the railroads, or the payment of an allowance therefor, is in conformity with efficient and economical management as contemplated by the Interstate Commerce Act. While the Commission makes findings to the contrary in its general report, they are based upon no substantial evidence of record and cannot be sustained.

POINT ONE

Spotting Service is Not in Excess of Team Track or Simple Switch Placement.

Although apparently *abandoned* in appellants' argument before this Court, one of the principal grounds assigned by the Commission for finding the spotting service to be unreasonable and preferential is that, as stated in the typical case of the appellee Weirton Steel Company, "such switching is in excess of team track or simple switch placement" (R. 103).

This finding, however, rests upon no factual basis; there is no evidence in the record to support it. Indeed, the Commission in one breath adopts a standard or measure of service obtainable under line haul rates, and in the next breath finds to have "merit" the argument that such standard or measure cannot be defined. In its general report the Commission says (R. 37):

> "The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team track or simple switch placement by the carriers involved herein can not be made. We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team track or simple switch placement can readily be ascertained at

> any individual industry by experienced railroad operating men or committees if honestly [sic] performed without consideration of traffic reasons."

Instead of supporting the Commission's finding, the unchallenged testimony of competent railroad officials supports *only* a contrary one. According to the Assistant General Manager of the New York Central Railroad (R. 303):

> "There is little difference between an industrial track or a spur and team track, because on the team track we have more or less spotting to do, such as automobiles and cars requiring crane unloading, or some instances where we have platforms at our team tracks, where meat is unloaded, other places where chickens are unloaded and they are taking team delivery at certain spots where they can be handled, where we have facilities for handling different commodities, so all in all it is about on the same basis."

Again, the Assistant General Manager of the Erie Railroad says (R. 273):

> "The most expensive, as regards time, is the placing of cars on a siding at a particular door which involves the shifting of cars already on that particular track. This usually occurs on small sidings or spurs rather than on the industrial tracks of large plants."

The subject is well considered in the testimony of the General Manager of the Lehigh Valley Railroad (R. 283):

> "Ordinary sidings are considered as more or less a substitute for team track delivery, you could term it that way. In some instances delivery on sidings is found to be more difficult than delivery on team tracks and in other instances less difficult.
>
> * * * * *

> "Substantially the same conditions exist in connection with the systems of plant tracks as with the ordinary single private sidings. There is very little difference—there is no difference in the way the work there is performed except in the number of tracks.
>
> * * * * *
>
> "Looking at the matter as a whole, from an operating standpoint and generally speaking, it is as economical to place cars on a plant track as it is to place them on a private siding or team track * * *."

In the words of the Vice-President of the Pennsylvania Railroad (R. 455):

> "I am convinced in my mind that the handling of cars to and from team tracks perhaps shows as much or more interference than you get at industrial plants where we have systems of tracks."

Even if, *arguendo*, it be assumed that spotting at the industries is in excess of the service accorded in team track or simple switch placement, contrary to the explicit testimony of record, there is nothing in the law to condemn it. As frankly stated in the Commission's general report (R. 16): "In the nature of things no inflexible formula can furnish a solution for that problem * * * when delivery at the plant is made." The Court may judicially notice the fact that, under tariffs recently found justified by the Commission, the railroads now receive and deliver less carload freight at the customer's door under the regular line haul rates, just as the carload freight involved in this proceeding is spotted at the industry's unloading platform under the same rates. In both cases the measure of the delivery service is the same; in both cases the performance may be by the patron, as a carrier agent, or by the carrier principal itself. *Pick-Up and Delivery in Official Territory*, 218 I. C. C. 441. Two specially constituted United States District Courts have refused to disturb the Commission's order in the

cited case. *Merchant Truckmen's Bureau of New York* v. *United States,* 16 F. Supp. 998; *American Trucking Associations, Inc.* v. *United States,* 17 F. Supp. 655.

POINT TWO

There is No Such Interruption or Interference Arising from the "Desires" of the Appellees or the "Disabilities" of their Plants as to Warrant the Commission in Condemning the Spotting Services There Performed.

In its general report the Commission finds, furthermore, that delivery beyond the interchange tracks at large industrial plants, such as those of appellees, cannot be effected "without interruption or interference by the desires of the industry, or the disability of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances" (R. 43).

We proceed directly to a consideration of the validity of these conclusions which underlie the Commission's findings of unreasonableness and preference in the spotting service generally.

A. Interruption or Interference Arising From the "Desires" of An Industry.

The railroads are, of course, aware that under the law no allowance should be paid where an industry withholds permission to enter the plant. In accordance with the Commission's own interpretation, this is the only point for which *General Electric Co.* v. *N. Y. C. & H. R. R. Co.,* 14 I. C. C. 237—a decision heavily relied upon by the appellants—is a direct authority.[1]

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[1]See discussion of this case, pages 27 to 29, *infra,* including foot-note 8.

But none of the cases at bar presents that issue (R. 458). In the plant of one of the appellees the railroad itself performs the spotting service (R. 210, 214). In another, the railroad once performed the service but later substituted an allowance in the interest of efficiency and economy (R. 206, 207). With the others, there is no evidence to show that the appellees would object to the railroads' performing the spotting, *and there is every implication to the contrary* (R. 233, 220, 216, 217, 202).

(1) The Commission, however, misapplies this sound principle of law and holds that where, by its nature, a plant requires spotting more or less at its own "convenience" and in accord with its "directions" there is sufficient evidence of interruption or interference arising from the "desires" of an industry as to make unreasonable a delivery beyond the interchange tracks. In the case of the plant of the appellee Pittsburgh Plate Glass Company at Ford City, Pa., for example, the Commission finds that "no obligation rests upon the carrier to perform switching and spotting service solely at the convenience of the industry" (R. 85, 86). And yet this convenience could easily be served by the carrier as a matter of operating routine. As stated by the Assistant Superintendent of that appellee (R. 216):

> "It is my judgment that The Pennsylvania Railroad could at the present time enter the plant and perform spotting with its own power without interfering with our industrial processes. Our engine makes an average of three trips a day to the interchange track, and the practice each trip is to clear the interchange. We gather loads from the spots at least twice a day. One locomotive could perform all our spotting service at this plant, if it were there at the proper hours, that is, at hours which would have to be designated by the industry. Normally we require a locomotive only five or six

> hours a day for interchange service, between the hours of 10 a. m. and 4 p. m. During that period our own power can be engaged in intraplant work."

Again, in the case of the plants of the appellee American Sheet and Tin Plate Company, it was testified by a representative of the industry that (R. 234):

> "If the Pennsylvania were to undertake to perform that service I don't have any idea that it would require the assignment of one or more locomotives for constant service at the plant on the industrial tracks, at all times, for the spotting service alone, but that depends a great deal on the amount of work to be done. The Pennsylvania would be required to place the cars after their arrival at Vandergrift as needed. To do that would necessitate co-operation between the industry and the R. R. in the matter of the assignment of a locomotive to the plant by the railroad to perform the spotting service. That could be arranged to conform to our needs. The interchange service, as a practical operating matter could be performed without any interference between the railroad power and the intraplant service. I don't think there would be any interference."

Certainly railroads must be free under the law to give delivery services such as described above. If this right be withheld, competing transportation agencies will take the business away from them. The Commission, it is submitted, goes too far. Of course, the railroads are attempting to serve industrial convenience. In no other way can they hope to remain an effective agency of transportation. To hold that the railroads, in making deliveries, cannot respect a shipper's convenience, or be guided by his reasonable directions, is tantamount to denying them an opportunity to compete in an era when competition among various transportation agencies knows few bounds.

No longer is the railroad a virtual monopoly; nor can it afford to be arbitrary and insensitive to the requirements of its patrons; nor can it survive under a "take it or leave it" policy. As stated by the Vice-President of the Pennsylvania Railroad (R. 453):

> "We should do all we can within the spirit of the law to make the industries connected with the rails of the carriers thoroughly comfortable in their transportation problems * * *. One of the important functions surrounding the efficient handling of plant operations undoubtedly lies in the spotting service. The originating and delivery of traffic is an important and integral part of the entire service rendered by a carrier.
>
> "In these times the railroads cannot afford to give up any advantage that they still possess over the competition of highway transport * * *. It is important, therefore, that the railroads shall hold on firmly to every advantage that now accrues to them in the performance of spotting, associated with private sidings and industrial tracks, and make them so useful to industries that there will be a minimum of diversion to highways and competing waterways."

And again (R. 459):

> "About 83 per cent of the tonnage of the Pennsylvania Railroad is handled to and from private sidings, if you exclude perishable freight, which is always on team tracks. Now, think what it would mean to our company to throw open all that traffic, or a large part of it, to the highway. That is one of the last big things we have got left with industry in this country, and the reason so many industries still stick, and say this country could not exist without the railroads, is because of the great efficiency that comes from these private sidings in the operations

of plants, and for that reason we have got to co-operate with them and we have got to block out this highway thing, these unregulated carriers."

And again (R. 459):

"* * * industries were located and built upon a definite understanding that spotting service would be accorded in the line-haul rates. I have myself assisted in locating many industries, and I consider it one of the most important things of the traffic officials of the Pennsylvania Railroad to locate industries on our railroad. You locate a nice industry about five miles from the town; you say to them, 'You don't have to come in town. Buy your property cheaper. Don't use the team tracks. Build your own siding. We will give you the service.' Now, you say to them, after it is all settled and the wheels are turning and the product is moving, 'We wish you prosperity. Grow and grow bigger all the time.' Then the minute it gets big you step in and say, 'Now you have got too big. We are going to charge you $2 a car.' There is nothing fair about that."

Moreover, there is not a word of testimony in the record to support the Commission's conclusion that, when an industry obtains spotting service under its "direction", it is "necessarily" preferred (R. 32). Certainly the team track shipper has not complained, nor has the industry which is served by what the Commission constantly refers to as a simple switch siding. There is no evidence that the traffic of such smaller shippers is handled with relatively less convenience to them, or in disregard of their instructions. The only fair conclusion to draw is that the convenience of every shipper, large or small, is consulted nowadays by the railroad, and every proper effort made to arrange service which will meet their particular needs.

According to the General Manager of the Lehigh Valley Railroad (R. 277):

> "We could hardly do any spotting at our convenience. We have got to consider the requirements of the receiver in all of our spotting on team, private track, or system tracks. We do spot cars on the team track or on ordinary spur track without consulting the consignee, but if we have a shipment for team track or private track that a shipper wants, [and if] it is not just as handy for us to place it in the morning as it is in the afternoon, and he wants it in the morning, we place it in the morning. We can't consult our convenience in any instance, naturally."

The fact that, at certain large industries, the assignment of engines and crews for "on call" or "standby" service is, or would be required to perform the spotting only indicates the volume of the extremely welcome traffic. In the case of the appellee Weirton Steel Company, for example, where the Commission holds (R. 102), that the carrier "is under no legal obligation to spot cars solely at the (industry's) convenience," it appears that "an engine must be at hand all day long * * * standby service 24 hours a day, 7 days a week" (R. 213). It further appears, however, that "in normal operation this engine does not have any idle time" (R. 213). The railroads only wish that the business of more team track shippers would warrant "standby" service, despite the well known fact that their cars of perishables, automobiles, chickens, and packing house products are moved with precision, and delivered upon expensive *railroad* property (R. 455, 464, 272, 283, 303, 305). See Commissioner Mahaffie's dissent (R. 44).

(2) The Commission again misapplies the same principle of law in finding that, where an industry has demon-

strated greater efficiency in performing the spotting service than has the carrier, there is sufficient evidence of "interruption or interference" arising from the "desires" of the former as to make unreasonable a delivery beyond the interchange tracks.

In the case of the appellee West Leechburg Steel Company, for instance, the carrier once performed the spotting but later substituted an allowance in order to save money and give a more satisfactory service. As explained by a railroad witness (R. 208):

> "There is nothing unusual in the operation of this plant. The demands of this company are not unreasonable as compared with other steel industries. The local service of the Pennsylvania just could not keep up with the operations. If this plant was in Pittsburgh instead of out in the country, the servicing of this plant would not be so costly. The present arrangement is more economical for the Pennsylvania and more satisfactory to the industry."

Surely it cannot be held that, because there is a natural reluctance to supplant satisfactory performance[2] by the

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[2]It is the testimony of railroad officials that an industry can perform the spotting more cheaply than can the railroad owing, principally, to different labor rates and requirements (R. 501, 469, 426,-7, for example). As stated in the Commission's general report (R. 36): "The industries generally use small locomotives, have fewer men in the switching crew, and pay lower wages than the railroad. Thus if railroad engine-hour costs are computed on the basis of the number of engine hours charged by the industry to interchange switching, it is clear that the cost to the railroad would be greater. However, if the spotting service which the industry performs is not one which the duty of the carrier requires it to perform, the cost thereof whether great or small is of no concern and no economy to the latter."

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 222 U. S. 199, 217, this Court said: "Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers * * *."

agent with costlier and less satisfactory performance by the principal, there is interruption or interference arising from the desires of the industry. A carrier should be permitted to exercise its discretion without limiting the service available under its line haul rates. And an inclination on the part of an industry to perpetuate efficient operations should not be construed as an active desire to exclude the carrier from the plant.

B. Interruption or Interference Arising From the Disabilities of a Plant, Such as the Manner in Which the Industrial Operations Are Conducted, the Arrangement or Condition of Its Tracks, Weighing Service, or Similar Circumstances.

Here, again, the Commission misapplies another sound principle of law. The railroads readily agree that where the disabilities of a plant give rise to interruption or interference which cannot be removed, and render their performance of a spotting service impossible, delivery is accomplished by the placement of cars on interchange tracks. But the railroads do object to the Commission's application of this principle as exemplified by the orders in issue here.

(1) *The disabilities of a plant arising from the manner in which the industrial operations are conducted.* There may, perhaps, be instances where such disabilities are insurmountable. But in applying the principle in the instant cases the Commission has gone no further than to ascertain whether, in its judgment, an overnight change from performance of the spotting service by the industry agent to performance of the same service by the carrier principal could be accomplished without any confusion. Obviously, where an allowance has been paid for a number of years and carrier and industry operations have become adjusted to

such an arrangement, it is unreasonable to condemn the allowance *today* because the carrier could not perhaps perform *tomorrow*. In such circumstances, it is submitted, the carrier's recognized duty under line haul rates remains unimpaired provided, of course, a breathing spell and rearrangement of affairs by the principal and the agent—which rearrangement might entail some expense on the part of both—would permit performance by the principal. As explained by a representative of the appellee American Sheet and Tin Plate Company (R. 235-6):

> "Under our present method of operation, there would be no interference if the railroad undertook to perform the terminal service and were in there at the same time our own engines were in there. If the railroads were to perform the spotting service at both Vandergrift and Scottdale, I don't believe in the beginning they would be just as efficient in all particulars if it were performed as the industry's power, for the reason that the railroad employees would not be as familiar with the industrial requirements as our own employees. Eventually they should be just as efficient. That is the only factor relative to efficiency that I can think of at present, although there may be others. If the carriers performed the service, I don't think they would perform the spotting work without any regard to the work of the industry. If the interchange service were performed by the railroads and the intraplant switching by the industry, it would require some cooperation between the two sides."

(2) *The disabilities of a plant arising from the arrangement or condition of its tracks.* The disabilities as found by the Commission are often those which would only be encountered through the use of modern railroad locomotives available in the immediate locality. But clearly such a view is too narrow. An obligation under line haul

rates to perform a spotting service, once properly established, is not thereafter subject to restriction solely because a railroad, to serve its own ends, has increased the size, or changed the type of its available locomotives. It can hardly be said, for instance, that a railroad, by electrifying certain tracks, automatically absolves itself from the duty of serving every industry the private facilities of which are not equipped to receive electric locomotives, and yet that is the ultimate and logical result to which the Commission's findings lead. Moreover, there can be no possible public interest in forcing an industry, which performs the spotting service as a railroad agent, to make needless expenditures in keeping pace with the developments and improvements in modern railroad science—all in order to obtain the delivery service contemplated by the freight rates it pays. As stated by an operating official of the Pennsylvania Railroad (R. 238):

> "If the American Sheet & Tin Plate Company were to straighten out all the curves and make an ideal track at its Vandergrift plant, so that our largest switch engines could be accommodated, and then continue to do the spotting for $1.10, we would still have to put additional power at that plant. I don't see how it would benefit us any. If the industry is doing the switching it doesn't make any difference how bad the track is, or how expensive it is to them to perform it over and above $1.10, because that is all we pay."

Nor can there be any public interest in requiring the railroads to keep on hand locomotives which either once negotiated the tracks, or could have negotiated them. And yet, if either of these completely uneconomic programs had been followed in the cases at bar, the Commission would have had no "disabilities" arising from "the arrangement

or condition" of the plant tracks to point to as supporting its findings.

An illustration of the Commission's misapplication of this legal principle is to be found in its condemnation of the allowance now being paid to the appellee Allegheny Steel Company for spotting at its Brackenridge, Pa., plant. In its report dealing with this allowance the Commission, as evidence of its unlawfulness, emphasizes that "an operating witness for the Pennsylvania testified that the industry tracks will not accommodate the railroad switching locomotives operated in this locality" (R. 68). However, the Commission *also* finds that "smaller locomotives are in use elsewhere" and apparently overlooks the significance of the fact that, in 1920, it expressly sanctioned the payment of this allowance as one of two methods of satisfying a complaint of discrimination filed by the appellee (R. 67-8). *Allegheny Steel Co.* v. *Director General*, 60 I. C. C. 575. Thus in 1920, certainly, the spotting service at this plant was included in the line haul rates; were it otherwise, as we shall see,[3] the complaint could only have been summarily dismissed in its entirety. Yet the Commission *now* holds the same allowance, *so inaugurated under its sanction*, to be unlawful because, among other reasons, smaller locomotives "in use elsewhere" would have to be pressed into service should the carrier itself perform the spotting service. It is submitted that a railroad's recognized duty under line haul rates does not vary with the size, or type of the equipment which happens to be in the neighborhood. The problem is well considered in the testimony of the Vice-President of the Pennsylvania Railroad (R. 458):

> "In regard to the engine negotiating the tracks, of [or] their inability to do so, there are cases where a

[3]See discussion pages 29 to 31, *infra*.

plant facility allowance was made 20 years ago, and at that time there was an engine in that vicinity that could negotiate all the tracks. If today the railroad company said, 'We are going to stop you as our agent doing this work; we are going to undertake this work again ourselves; so clear the deck so we can go in'; then we can't negotiate the track. Do you think that would be fair? I don't, and you will find that in many cases over a period of years the track curvature has remained the same and the power has grown very materially, and you can't negotiate tracks today that you could 20 years ago."

(3) *The disabilities of a plant arising from the performance of a weighing service.* In its general report the Commission finds that (R. 38):

> "Practically all industries engaged in the production of iron and steel products, cement, sand and gravel, and similar heavy commodities, maintain track scales within their plants and weigh all cars handled both empty and loaded."
>
> * * * * *
>
> "Ordinarily the weights obtained by the industries are accepted by carriers for assessing freight charges, and the carriers are thus relieved of weighing on their scales."

Because the cars spotted at the plants in question move to and from the interchange tracks via the scales, where they are weighed, the Commission concludes[4] that a railroad

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[4]In the opinion of the Commission, the important fact is not, apparently, the weighing service itself but rather, the interruption in the spotting service which it causes. In the case of the appellee Weirton Steel Company, for instance, the appellants, at page 95 of their brief, refer to "two separate and distinct switch movements via the Pennsylvania of cars spotted at the steel works." Although this particular interruption is not caused by the weighing of cars, nevertheless it is used by the Commission as evidence of the impropriety of including a spotting service in the line haul rates (R. 214).

could not perform the spotting service "in one uninterrupted movement at its ordinary operating convenience" (R. 50, 68).

What railroad service is there that is not subject to interruption? The position of the Commission that spotting must be accomplished without interruption in order to be within the scope of line haul rates is only indicative of a failure realistically to comprehend ordinary railroad operations. According to the undisputed testimony of a railroad official with reference to the appellee Weirton Steel Company (R. 214):

> "There is no more interference with the operations of this railroad by intraplant movements at this plant than there is ordinarily in any railroad yard. This carrier's schedule at this plant is made to conform with the industry's schedule. Only occasionally is there any interference by the industrial power. Such interference might arise from car failures, engine failures, or an unusually heavy amount of work within a certain distance. This interference is not serious enough to increase the operating costs ordinarily incurred in spotting an industrial plant. The same kind of interference also occurs within our own terminal yards."

On the same point the testimony of the Assistant General Manager of the Chicago & North Western Railway Co., is emphatic (R. 370, 371):

> "It seems to me from what I have heard here that a great many people have not the right conception of what constitutes switching on a team track. We would much rather switch in a well laid out industry than a team track. When you start switching a team track you are just as liable to switch out every other car and replace it and then possibly pay a claim for damage to the contents because it was not properly put down in the car. * * * And many times we have switched a

team track of 20 or 25 cars and only have taken two empties out, and the same may be true of 5, 6, or 7 other tracks in the same yard. We despise team track when it comes to switching. My answer assumes, of course, that we have no interference from the industry. We do not have any interference with the industry. We do not permit any."

The Vice-President of the Pennsylvania Railroad gave further light on this subject (R. 455):

"* * * if a man is unloading a car on a team track, using Pittsburgh Produce Yards, if you please, as a fair example of it, maybe he is almost through his job of unloading a car, and if we go in there and switch that car, he may not get it back for two hours to finish just a part of a load. Now, in that case, the engine comes up, the situation is looked over, and tolerance shown, and I should say that we missed the guess a great deal in our early consideration of this thing when we compared a siding to a team track, that we did not take into consideration those elements * * *."

Moreover, in *United States* v. *Union Stock Yards Co.*, 226 U. S. 286, 304, 305, this Court quoted with approval the following language from the decision in *Union Stock Yards Co.* v. *United States*, 169 Fed. Rep: 404, 406, wherein Mr. Justice Van Devanter (while a Circuit Judge) speaking for the Court of Appeals, said:

"Its (the Stock Yards Company's) operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these

shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. *True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point.* * * *" (Italics supplied.)

POINT THREE

The Spotting Service at These Plants is, by Custom, Included in the Line Haul Rates.

In the brief of the appellants (page 28) it is acknowledged that—

> "Where work done by the shipper is in fact part of the transportation service under the line haul rates the Commission does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13))."

Whether or not the spotting service is included in the line haul rates is, of course, pertinent here. As stated by the Commission in its general report (R. 28):

> "If a carrier operates over private industrial tracks it is because in its discretion it elects to do so, and its legal obligations in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. * * * Further, the rendition by the carrier of such services as are not contemplated by the com-

pensation which it receives free and without additional charge is prohibited by section 6 of the act. *American Exp. Co.* v. *United States, supra; Louisville & N. R. Co.* v. *United States, supra.*"

In each of the five cases at bar where an allowance is paid for the spotting the Commission finds, as stated in the typical report concerning the appellee Pittsburgh Plate Glass Company, that (R. 86):

> "By such payment the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation in the interstate transportation of property, in violation of section 6 (7) of the act."

And in the case of the appellee Weirton Steel Company where the carrier itself does the spotting it finds that (R. 103):

> "The switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line haul rates."

The Commission rests these findings upon two grounds, both untenable.

The *first* ground urged as justification for these findings is that, as stated by the Commission in its general report (R. 16, 17, 32):

> "The tariffs publishing the line haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for

'plant switching'[5] or 'spotting of cars at unloading point' to be performed at plant's convenience.

* * * * * *

"*In the absence of a tariff provision,* for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of section 6 of the act, and necessarily preferential." (Italics supplied.)

The difficulty with this finding is that it is based on a faulty premise. The railroads are under no legal obligation separately to charge for a spotting service; it may, as here, be included in the line haul rates. The point was clearly made[6] by this Court in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105, where it was held:

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered

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[5]Not to be confused with intra-plant switching, that is, the movement of a car from one point in the plant to another point in the same plant, for which, as found by the Commission in its report (R. 15): "A charge would be collected if performed by the carriers."

[6]In *Mitchell Coal & Coke Co.* v. *P. R. R.,* 230 U. S. 247, 263, this Court, pointing to the well-established rule, held that "inasmuch as this rate included the haul the Railroad was bound to transport coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor."

And in *C. & O. Ry. Co.* v. *Westinghouse, Church, Kerr & Co., Inc.,* 270 U. S. 260-5, it was held that since the "service of spotting cars was included in the line-haul charge under both interstate and state tariffs, * * * an extra charge for performing this service was illegal. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act."

Compare *Wight* v. *U. S.,* 167 U. S. 512, where the line-haul rate did not cover the service performed either by its terms, or by general practice.

to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."

And the *second* ground advanced in support of the same findings is that, as stated at pages 31 and 36 of appellants' brief, "it has never been and is not now general railroad custom and practice to treat the spotting service here involved as included in the transportation obligation under the line haul rate." The argument runs that throughout the decisions of the Courts and the Commission the validity of a distinction "between plant facilities and true agencies of transportation" has always "been assumed", and that "while the practice (of according a spotting service) is followed in considerable measure in the eastern industrial section, the carriers in that section by no means grant allowances to, or perform the spotting for, all industrial plants served by them."

It is submitted, however, that the position of the appellants is not sustainable, for the following reasons:

(a) There is no showing in the record that, at the plants which do not call upon the carriers to perform the spotting, a special condition is not present, such as an unwillingness on the part of the industry to admit the carrier. In such a circumstance, as we have seen, the transportation obligation is ended upon placement of the cars on the interchange tracks. In their brief (page 37) the appellants, as evidence of the lack of custom in according a spotting service, emphasize the fact that on the Pennsylvania Railroad, for example, there are "125 industries which perform their own spotting without allowances from the railroad." However, there is no evidence as to *why* these industries do their own spotting, and accordingly the following testimony of the Chief of Freight Transportation of the Pennsylvania Railroad, with reference to the same plants cited by the appellants, should be accepted (R. 338):

"In cases where the industry performs its own service and no allowance is made, generally the railroad is probably ready and willing to do the spotting that they are supposed to do, but the industry for some reason or other elects to do it themselves, although the railroad, if the industry did not want it, would do the spotting."

(b) If the validity of a distinction "between plant facilities and true agencies of transportation" be assumed, *arguendo*, it is significant to observe the application of such assumed distinction to spotting services *of the type here involved*. In *Car Spotting Charges*, 34 I. C. C. 609, in order "to comply with a suggestion of the Commission in the *Industrial Railways Case*",[7] substantially the same railroads that are presenting this brief filed tariffs proposing separately published spotting charges (over and above the regular line haul rates) at industrial plants described by the Commission as follows, at page 615:

"The basis of selection of industries, if there may be said to have been any such basis, varied with the different respondents. *The necessity for an intraplant service in addition to the movement of cars incident to the receipt and delivery of carload freight seems to have been controlling in some cases*, but in general the industries were arbitrarily selected, and range from the ordinary mill or factory with a single spur or private siding *to the large iron and steel industries having an interior system of rails called a plant railway.*" (Italics supplied.)

The tariffs were first suspended by the Commission and then ordered cancelled. The Commission held (34 I. C. C. 616, 618):

[7] 29 I. C. C. 212.

"The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant."

And again:

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary."

And again:

"* * * the mere fact that an industry is complex or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt or delivery of carload freight."

And again:

"To permit the carriers to add to the line-haul rate a charge for the movement of cars incident to the receipt and delivery of carload freight at industries selected because of their size or complexity, or upon some other basis equally uncertain, while treating a like service at all other industries as covered by the line-haul rate, would result in unjust discrimination of a flagrant character."

This decision takes on added significance when it is appreciated that, in cancelling the proposed imposition of

spotting charges at plants of *the general type as here involved*, the Commission had before it and expressly distinguished its prior decision in *General Electric Co.* v. *N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237.[8] With

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[8]This same case, with the same factual situation, was litigated anew in the courts of New York State. *General Electric Co.* v. *N. Y. C. & H. R. R. Co.* (1916), 219 N. Y. 227; 114 N. E. 115; certiorari denied, 243 U. S. 636. To the extent this case may be considered, *arguendo*, as tending to restrict spotting services or the making of allowances therefor, the much later decision of the Supreme Court of Wisconsin in *Nekoosa-Edwards Paper Co.* v. *Railroad Commission* (1927), 213 N. W. 633, tends equally to a liberal view of the subject, and it is of interest to note that the court in deciding the latter case had before it the *General Electric* decision. In the *Nekoosa-Edwards Case* spotting allowances were upheld as lawful under the circumstances described, as follows:

> "The plaintiffs own and operate large paper mills with the facilities incident thereto, including a network of spurs and switch tracks. One plaintiff has four, and another has seven, miles of trackage. Plaintiffs individually own switch engines, hire crews therefor, and do all the switching at their plant, including intraplant switching. They take cars from the receiving tracks to their respective plants to the point of loading or unloading and return them to the receiving track when empty or loaded ready for outbound movement. Originally the carriers placed inbound cars at the plant where they were to be loaded or unloaded, as the case might be, and took the cars from the point of unloading or loading when they were ready for the outbound movement. Some of the plants were served by two, some by three, and one by four, separate railway systems. This made it necessary for the switching crews of the different railway systems to go upon the premises. It was difficult to arrange convenient times. They often interfered with each other's movements, and also with various movements of cars within the plant, and an arrangement was finally entered into by which the plaintiffs took the cars from the receiving track, loaded and unloaded, and placed them at the plants where they were to be loaded and unloaded, and, when the cars were ready for the outward movement, placed them again on the receiving track, from which they were taken by the carrier, so performing a service which prior to this arrangement had been performed by the carriers. It appears that this arrangement is more largely for the convenience of the plants than of the carriers. As the plants

reference to the cited case the Commission said (34 I. C. C. 617):

> "In *General Electric Co.* v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, *but the case did not require a decision of that question.* The point *actually decided* was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it *to permit* the carrier to perform the service." (Italics supplied.)

Curiously enough, the same decision in the *General Electric Case* which the Commission distinguished in rejecting, in 1915, the publication of a spotting charge at industries of the same kind as here before the Court, is *now* heavily relied upon by the appellants as sustaining their propriety. Whatever other effects such inconsistency may have, it certainly does *not* support the Commission's conclusion that, at plants of the type here in question, spotting is excluded from the scope of line haul rates as a matter of recognized custom.

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grew in proportion and the amount of intraplant switching increased, it became increasingly inconvenient to have the plant operations interfered with by the switching crews. When the whole movement, both that to be performed by the carrier and the intraplant movement to be performed by the plant, was done by one crew, the work could be organized and done much more expeditiously and economically. In order to arrive at the compensation, a system of cost accounting was installed, and the amount of $1.50 per car was allowed for the services performed by the plant for the carrier. This was believed to be slightly below its actual cost to the carrier."

(c) At the plants of two of the appellees the allowances are now being paid under alternative orders of the Commission. *Pittsburgh Plate Glass Co.* v. *Director General,* 58 I. C. C. 81; *Allegheny Steel Co.* v. *Director General,* 60 I. C. C. 575. In both instances, these appellees complained of discrimination and the Commission ordered the defendant carriers either to grant spotting allowances to them or cancel similar allowances paid to other plants, their competitors.

If, as now urged by the appellants, the payment of these same allowances is without consideration, forbidden and unlawful in violation of section 6 (7), the alternative orders in the cited cases were entered in the very teeth of decisions of this Court. In this connection, reference need only be made to pages 54 to 63, inclusive, of appellants' brief. It is there argued that the allowances involved in the instant proceeding are similar to the allowances condemned by this Court in *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, and *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, since they do not cover "transportation services for which the carriers may lawfully compensate," and "the record discloses that (they) are nothing more than a device to attempt to lend legality to the payment of rebates * * *." Accordingly, the appellants continue, the instant proceeding is not one in which the railroads should be left free to remove the discrimination by extending the payment of the allowances to others, and in this regard "this court's attention is particularly called" to its language in *Merchants Warehouse Co.* v. *United States, supra,* at page 513:

> "For reasons already indicated, the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending

> the benefit of the allowances to the competing warehouses. * * * the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs * * *."

In the circumstances, when the Commission in the *Pittsburgh Plate Glass* and *Allegheny Steel Cases, supra,* permitted the railroads to remove the discrimination complained of through the payment of spotting allowances, it necessarily found that the service of spotting was included in line haul rates. *Upon no other ground, upon no other factual basis could the Commission in accordance with the decisions of this Court as cited in the appellants' brief,* have entered alternative orders. To say, as the appellants now do, that spotting at the plants in question is not included in line haul rates is to ignore the Commission's express findings to the contrary[9] in these and many other similar cases.[10] Here again, whatever other effects such inconsistency may have, it certainly does *not* support the Commission's conclusion that, at plants of the type here involved, spotting is, by custom, excluded from the application of line haul rates.

(d) Most of the appellee plants are engaged in the iron and steel business. Only a few years ago the Com-

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[9]This disregard of the Commission's own precedents is emphasized by the fact that, in now condemning the allowance paid to one of the appellees, the appellants rely, in large part, upon the identical testimony which was before the Commission when it ordered the railroad, in the alternative, to establish the allowance (R. 68).

[10]For example, see *Stewart Iron Co.* v. *Pennsylvania Co.*, 47 I. C. C. 512; *Donner Steel Co., Inc.* v. *Delaware, Lackawanna & Western R. Co.*, 57 I. C. C. 745; *Riter-Conley Mfg. Co.* v. *Director General*, 58 I. C. C. 327; *Central Iron & Steel Co.* v. *Pennsylvania R. Co.*, 59 I. C. C. 385; *Florence Pipe Foundry & Machine Co.* v. *Pennsylvania R. Co.*, 188 I. C. C. 215. The case last cited was decided September 30, 1932.

mission, following an exhaustive investigation, made a "thorough revision" of the rates on iron and steel articles in eastern territory. *Iron and Steel Articles,* 155 I. C. C. 517, 562; 161 I. C. C. 386; 161 I. C. C. 608. Clearly the line haul rates prescribed in that decision were not intended for application *only* to and from the interchange tracks of the iron and steel plants. On the contrary, there is not even a suggestion of such limited application in the Commission's report. In the understanding of the Assistant to the President of the Carnegie Steel Company (R. 491):

> "The scale of rates therein ordered by the Interstate Commerce Commission was with the full knowledge on the part of the railroads, the shippers, and the Commission that they covered this so-called terminal or spotting service. Otherwise there would, without doubt, have been serious objection on the part of the iron and steel shippers to the scale of rates ordered in by the Commission in that case."

Moreover, were it otherwise, the Commission would have fixed a separate spotting charge, as it did in 1916, in connection with the rates on iron ore. Iron Ore Cases, 41 I. C. 181; 44 I. C. C. 368. In the decision last cited, as pointed out by Commissioner Eastman in his dissenting opinion in *Carnegie Steel Co.* v. *Director General,* 132 I. C. C. 689, 699, 700, what the Commission "really found" was:

> "* * * that in the case of iron ore brought from the lake ports to the great iron and steel plants the duty of the carriers under their line-haul rates ends with delivery at some reasonably convenient point of interchange with the industry tracks and that the service of switching the cars from such points of interchange to points of unloading and returning them therefrom is

> a service which should be performed either by the industry itself or by the carriers for a separate charge."

As stated in the testimony of the Assistant to the President of the Carnegie Steel Company (R. 493):

> "With respect to the rates on iron ore, where the railroad does the work of carrying the car beyond our property line to the point of unloading, the roads assess and collect a spotting charge. That is under the decision in the Ore Spotting Case of 1916."
>
> * * * * *
>
> "* * * on iron ore the line-haul rate applies only up to the property line, and on everything else it includes spotting."

Iron and steel articles are not the only example. Coke is another commodity which, in large quantities, is both consumed at, and shipped by a number of the industrial plants considered in the Commission's proceeding. And yet, when the Commission recently prescribed scale rates for the transportation of coke in a large portion of Eastern territory, no spotting charge was provided, nor were the rates restricted for application to and from plant interchange tracks. *Coke between Points in Central and Illinois Territories*, 194 I. C. C. 640. The same is true with respect to rates prescribed or approved on bituminous coal, a commodity which of course is consumed in volume by most of the plants in question. *Bituminous Coal to C. F. A. Territory*, 46 I. C. C. 66; *Ohio-Michigan Coal Cases*, 80 I. C. C. 663; *Intrastate Rates on Bituminous Coal Within Ohio*, 192 I. C. C. 413; *Central Pennsylvania Coal Producers Assn., et al.* v. *B. & O. R. Co., et al.*, 196 I. C. C. 203; *Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown, O.*, 197 I. C. C. 617. It is also true of rates on industrial sand, *Industrial Sand Cases, 1930*, 188 I. C. C. 99; and stone, *Consolidated Stone Cases*, 200 I. C.

C. 65; and lumber, *Lumber Between Points in Official Territory*, 214 I. C. C. 493; 219 I. C. C. 429.

There are numerous other instances[11] where the Commission has prescribed rates on commodities which are either produced or consumed by industries of the kind here involved, and yet in no such instance is there to be found the slightest indication that the rates are to have a restricted application so far as spotting is concerned. In the circumstances the Commission has tacitly recognized that, *with the single exception of rates on iron ore*, the duty of the railroads under their line haul rates does not end with delivery or begin with receipt at plant interchange tracks but, on the contrary, includes a spotting service.

It can hardly be said, therefore, that the inclusion of a spotting service in the line-haul rates is unsupported by general practice and recognized custom. For the four reasons just enumerated, as well as those set forth in the brief of the appellees, the conclusion is inevitable that line-haul rates do include that service at the plants of the appellee companies, as well as others of the same kind.

POINT FOUR

The Payment of Allowances to Cover Spotting Services, or Their Performance by the Railroads, is in Conformity With Efficient and Economical Management as Contemplated by the Interstate Commerce Act.

Although apparently *abandoned* in appellants' argument before this Court, the final ground assigned by the Commission for holding the spotting service to be unlawful is that, as stated in its general report (R. 43):

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[11] *Rates on Raw Dolomite and Fluxing Stone within State of Ohio*, 188 I. C. C. 495; *Lime from Eastern Trunk Line Points to Pittsburgh, Pa., Youngstown, Ohio, and related Points*, 93 I. C. C. 617; *Ohio Lime Mfgrs. Assn.* v. *P. R. R.*, 214 I. C. C. 417; *Eastern Brick Rates*, 218 I. C. C. 59.

> "Such payment (of spotting allowances) or performance (of spotting services) dissipates respondents' funds and revenues, is not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

In the dissenting opinion of Commissioner Mahaffie it is stated, with reference to this finding, that "while it is concluded that allowances are wasteful and contrary to the public interest, the jurisdictional findings necessary to support that conclusion are not made." His opinion continues (R. 44):

> "In determining whether a practice is wasteful we should be in position to find that it has an adverse effect on the carrier's net income. No such finding can, I think, be made as to the practices here held unlawful. Nor do I understand the majority so to find."

The only testimony of record on this point is to the effect that, should line-haul rates be restricted to exclude the spotting service, the railroads might well suffer in the diversion of traffic to trucks and waterways. On this subject the undisputed testimony of the Vice-President of the Pennsylvania Railroad is clear, and is confirmed by the testimony of one of the leading witnesses on behalf of the industries generally (R. 492, 453). The situation is not dissimilar from that discussed by the Commission in authorizing the institution of pick-up and delivery service in connection with less carload freight. As stated in the report in that case, *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 467:

> "* * * the fact that respondents are here proposing a service which will add to their transportation costs, while in *Emergency Freight Charges, 1935, supra,*

> they sought an increase in their freight rates, is not necessarily inconsistent, as protestants contend, for rates, or a service, that will not move the traffic warrants an attempt to secure some revenue either by reducing the rates or improving the service if such can be reasonably accomplished."

There is no evidence in the record to support the Commission's finding of inefficient management, and in their brief the appellants point to none. No possible ground exists, therefore, for upholding it.

CONCLUSION

In the opinion of the railroads, the decree of the lower court should be affirmed.

Respectfully submitted,

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GUERNSEY ORCUTT,
ANDREW P. MARTIN,
MARION B. PIERCE,
CHARLES R. WEBBER,
M. CARTER HALL,
JERVIS LANGDON, JR.,
Solicitors for Railroad Companies, as Amici Curiae.

April 1, 1937.
1500 First National Bank Bldg.,
Richmond, Virginia.

APPENDIX A

The Railroad Companies on Whose Behalf the Foregoing Brief is Filed—

H. B. Stewart, Trustee of The Akron, Canton & Youngstown Railway Company, Debtor,
Ann Arbor Railroad Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers,
Baltimore & Ohio Railroad Company,
Bessemer & Lake Erie Railroad Company,
Central Railroad Company of New Jersey,
Chesapeake & Ohio Railway Company,
Chicago and Eastern Illinois Railway Company,
Chicago and Illinois Midland Railway Company,
Chicago, Indianapolis & Louisville Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees.
Chicago River & Indiana Railroad Company,
Delaware, Lackawanna & Western Railroad Company,
Detroit, Toledo & Ironton Railroad Company,
Elgin, Joliet & Eastern Railway Company,
Erie Railroad Company,
Grand Trunk Railway System,
Illinois Central Railroad Company,
Indiana Harbor Belt Railroad Company,
Lehigh & New England Railroad Company,
Lehigh Valley Railroad Company,
New York Central Railroad Company,
New York, Chicago & St. Louis Railroad Company,
New York, Ontario & Western Railway Company,
Norfolk & Western Railway Company,
Pennsylvania Railroad Company,
Pere Marquette Railway Company,

Pittsburgh & Lake Erie Railroad Company,
Reading Company,
Virginian Railway Company,
Wabash Railway Company, Norman B. Pitcairn and
Frank C. Nicodemus, Jr., Receivers,
Western Maryland Railway Company,
Wheeling & Lake Erie Railway Company.